or not the accounts so far rendered are in favour of or against the appellant's claim that a considerable sum was due to him from the Karta's share. It is to be noted that the appellant was not concerned with the respondent's share. There is no dispute to the appellant's claim that of all the properties, the property concerned is the more valuable piece. The respondent himself has stated that measuring 16a.1r.01p. it is now priced at least $1,239,213.50, i.e. $1.75 per sq. ft.

We find that there are many factors concerning the caveat which were not considered and from the evidence that is available the considerations in favour of maintaining the caveat outweigh any consideration that has so far been shown to be in favour of removing it. We therefore restored it. But in allowing the appeal we must remind the parties that it does not mean that the respondent cannot come back and make a fresh application. Indeed if he has good new grounds he may re-apply to the court for its removal.

Appeal allowed.

Solicitors: *Sethu, Ghazali & Gomes; Gill and Tang.*

GOON KWEE PHOY v. J. & P. COATS (M) BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Wan Suleiman F.J. & Abdoolcader J.) January 28 & April 2, 1981]

[Ipoh — Federal Court Civil Appeal No. 173 of 1980]

Industrial Law — Employment of workman terminated on ground of redundancy — Representations made by workman on his dismissal without just cause or excuse — Reference to Industrial Court — Finding that there was no redundancy which would justify company dismissing or terminating employment of workman — Compensation in lieu of reinstatement awarded by Industrial Court — Award quashed by High Court on ground that Industrial Court had no jurisdiction to conclude that the termination of services of workman was a dismissal — Appeal allowed in Federal Court — Termination without just cause of dismissal is dismissal in respect of which Industrial Court can order reinstatement or award compensation in lieu — Industrial Relations Act, 1967, s. 20(1).

Administrative Law — Certiorari — Award of Industrial Court — Whether Industrial Court has jurisdiction to conclude that termination of services of workman was dismissal — Termination without just cause of dismissal is dismissal in respect of which Industrial Court can order restitution or award compensation in lieu — Industrial Relations Act, 1967, s. 20(1).

In this case the appellant had his employment with the respondent company terminated on the ground of redundancy. The appellant made representations alleging that he had been dismissed without just cause or excuse. The Minister eventually referred the representations to the Industrial Court. The Industrial Court held on the evidence that there was no redundancy which would justify the company dismissing or terminating the employment of the workman. In the circumstances of the case the Industrial Court did not order reinstatement of the workman but made an award of compensation in lieu of the reinstatement asked for. The company applied to the High Court for the award to be quashed. The High Court agreed that there was no redundancy but the learned judge held that that the employment of the workman has been terminated in accordance with the contract of employment and that an employer was entitled to do this without making himself liable under the Industrial Relations Act, 1967 to an order of reinstatement or compensation in lieu of reinstatement. The learned judge therefore quashed the award. The appellant appealed.

Held: (1) having regard to the company's pleadings in the Industrial Court, the High Court was not correct to consider the ground of termination by due notice which had not been relied on in the Industrial Court;

(2) even assuming that it was possible for the High Court to consider the ground, termination by due notice but without just cause or excuse is a dismissal in respect of which an Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement;

(3) on the finding that there was no redundancy in this case the conclusion was inevitable that the termination was without just cause or excuse advanced and therefore without just cause or excuse.

Cases referred to:-

(1) *Langston* v. *Amalgamated Union of Engineering Workers & Anor.* [1974] 1 W.L.R. 185.

(2) *Hotel Jaya Puri Berhad* v. *National Union of Hotel, Bar and Restaurant Workers & Anor.* [1980] 1 M.L.J. 109, 114.

(3) *Thompson* v. *Goold & Co.* [1910] A.C. 409, 420.

(4) *Reg.* v. *National Insurance Commissioner, ex parte Hudson* [1972] A.C. 944, 1005.

(5) *Attorney-General* v. *Great Eastern Railway* (1880) 5 App. Cas. 473, 478.

(6) *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.

(7) *P. Raman* v. *Chairman, Board of Governors, Sekolah Rendah Jenis Kebangsaan Gopeng & Anor.* [1973] 2 M.L.J. 161, 162-163.

(8) *Haji Ariffin* v. *Government of Pahang* [1969] 1 M.L.J. 6, 10, 15, 16.

(9) *Shrinivas Ganesh* v. *Union of India,* A.I.R. 1956 Bom. 455.

(10) *P.L. Dhingra* v. *Union of India* A.I.R. 1958 S.C. 36, 40.

(11) *Gnanasundram* v. *Public Services Commission* [1966] 1 M.L.J. 157, 159.

(12) *Reg.* v. *Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union* [1966] 2 Q.B. 31.

(13) *Chartered Bank, Bombay* v. *The Chartered Bank Employees' Union* A.I.R. 1960 S.C. 919.

(14) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 171.

(15) *Dr. A Dutt* v. *Assunta Hospital* [1981] 1 M.L.J. 304.

(16) *London Transport Executive* v. *Clarke* [1980] I.C.R. 532, 538-539.

HIGH COURT.

V.T. Nathan for the applicant.

D.P. Xavier for the respondent.

Cur. Adv. Vult.

Gunn Chit Tuan J.: This originating motion was an application by J & P Coats (M) Bhd. (hereinafter referred to as "the company") for an order of *certiorari* to remove into the High Court to quash Industrial Court Award No. 66/79 ordering the company to pay one Mr. Goon Kwee Phoy (hereinafter referred to as "the workman"): —

(a) as compensation in lieu of reinstatement the total remuneration he would have earned from his salary from January 1978 to May 31, 1979.

(b) any bonus, allowances or benefits due under the Company's Pension Scheme or otherwise from January 1978 to May 31, 1979.

(c) as compensation for loss of future earnings, the total remuneration based on his last drawn salary calculated from June 1, 1979 to April 22, 1980.

The grounds on which relief was sought by the company are contained in a statement filed pursuant to Order 59 rule 3(2) of the Rules of the Supreme Court England 1883. Briefly the complaint of the company was that the Industrial Court had erred in law and had acted in excess of its jurisdiction or without jurisdiction: —

(i) in misdirecting itself on the meaning and effect in law of the term "redundancy";

(ii) in failing to distinguish the legal definition between "dismissal from service by reason of misconduct as a punitive measure" and "termination of service" by due notice or salary in lieu;

(iii) in awarding compensation under section 20 of the Industrial Relations Act, 1967 and/or in awarding compensation which was contrary to established principles of law.

The said workman first commenced employment in the company w.e.f. April 1, 1972 and his letter of appointment was as follows: —

"Letter of Appointment

We confirm herewith your appointment to the staff of J. & P. Coats (Malaysia) Sdn. Bhd., subject to the following conditions:—

1. Your employment will commence as from 1st April 1972 at a salary of $1,300.00 per month.
2. You are employed as Purchasing Officer and for such other duties as may be assigned to you from time to time and you will not engage in any other business or occupation whatsoever and will not divulge to any person, firm or corporation any knowledge or information which you may acquire during the course of or incidental to your employment concerning the company's business, affairs or property.
3. You are entitled to twenty one days (21) with salary and allowances at such times as may be convenient to the company.
4. If you shall at any time disobey or neglect or refuse to perform or comply with all directions given by the company or any office of the company in respect of your employment or shall fail to observe any of the terms confirmed in this letter or shall be guilty of insobriety, misconduct or dishonesty, you may be immediately dismissed without notice and shall not be entitled to payment of any sum whatsoever except your salary and allowances (if any) up to the time of dismissal.
5. For the purpose of computing service benefit, your services with Malayan Thread Co. Sdn. Bhd. will be taken into account. All service benefits accrued by you during your service with Malayan Thread Co. Sdn. Bhd. will be retained by us and shall be only payable to you upon retirement from this company, or should you decide to resign from the services of J. & P. Coats (M) Sdn. Bhd. before your Retirement date, service benefits retained by us in respect of your past services with Malayan Thread Co. Sdn. Bhd. will be paid to you on termination of service with company.
6. *This appointment is terminable by giving one month's notice in writing or pay in lieu thereof by either the company or yourself.* (emphasis supplied).

This letter does not purport to be an exhaustive list of the terms of employment offered to you but will guide you on the main points. If you are in agreement with its contents. please sign on the space provided in the duplicate copy."

According to the company, the workman's services were terminated by a letter dated January 19, 1978 on the grounds that his position in the company had become redundant. He was paid his salary right through to the end of February 1978 and was also offered six months' salary by way of an ex-gratia payment in recognition of his past service by way of retrenchment benefit. The total sum offered to the workman amounted to $11,020 subject to income tax clearance. Subsequent thereto, the workman filed a representation in writing with the Director-General of Industrial Relations complaining that he had been dismissed from service without just cause or excuse within the meaning of section 20 of the Industrial Relations Act, 1967 (Revised — 1976). There being no settlement the Minister of Labour and Manpower referred the matter to the Industrial Court, and pursuant to that reference the workman filed a statement of case in which he contended that the alleged "termination of service" was not done for genuine business reasons and he therefore raised the issue that his "arbitrary dismissal barely 28 months before his normal retirement was an unfair labour practice". He asked the Industrial Court to find that his "dismissal" was unjustified in the circumstances and to order his reinstatement. Alternatively, he prayed for an order that he be paid "his salary, allowances and other monetary benefits calculated from January 13, 1978 (date of "dismissal") to April 22, 1980 (date of normal retirement)." The company in their statement in reply pleaded *'inter alia'* that the workman had not been dismissed from service as alleged and that his services were terminated by the payment of salary in lieu of notice and an ex-gratia payment amounting to six months' salary.

The Industrial Court heard the case on March 29, May 7 to 9, 1979 and handed down its award on May 31, 1979. In paragraph 20 of the said award, the Industrial Court held *'inter alia'* that "on the evidence ... the company has failed to discharge the onus on it to prove that the workman was redundant. The termination of his service is a dismissal without just cause". The said court then went on to hold that "in the circumstances of this case the proper remedy is not reinstatement but a just and equitable compensation". It then awarded compensation as set out in the first paragraph above.

On the company's contention that the Industrial Court had acted in excess of its jurisdiction or without jurisdiction in awarding compensation, Mr. Nathan, counsel for the company, submitted that the said court not only misdirected itself on the applicability of the *"ratio decidendi"* in the English case of *Langston* v. *Amalgamated Union of Engineering Workers & Anor.*[1] which our Industrial Court had quoted as authority for its said decision that "when a man is unjustly deprived of his work, the court must order reinstatement or compensation in lieu of reinstatement. In the circumstances of this case, the proper remedy is not reinstatement but a just and equitable compensation". Counsel stated that the Industrial Court had given no reasons whatsoever for concluding that the proper remedy was not reinstatement but a just and equitable compensation. He argued that even if, as held by the Industrial Court that the workman ought not to have been declared redundant, reinstatement should have followed. Counsel contended that section 20 of the Industrial Relations Act preserved a workman's right to seek relief in a civil court and conferred jurisdiction

on the Industrial Court to order reinstatement only which was a special jurisdiction conferred on that court and was not available to any other court in the country. Counsel however in his written submission did refer to section 30(6) of the Industrial Relations Act, 1967 which is as follows: —

"In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under section 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3)."

He submitted that the wording of the abovementioned subsection (6) of section 30 of the said Act was not wide enough to confer an alternative remedy to that expressly provided by section 20 of the Act. In support of his argument, he referred to the recent case of *Hotel Jaya Puri Berhad* v. *National Union of Hotel, Bar and Restaurant Workers & Anor.*[2] in which case the National Union of Hotel, Bar and Restaurant Workers had alleged that some of their members were dismissed and not retrenched as alleged. In that case the Industrial Court in its award found *'inter alia'* that the termination of service of the said union's members was a discharge of workers following a closure of business and not retrenchment as understood and accepted in industry. The said court also awarded two months' basic salary and fixed allowances as compensation. The Hotel in question applied to the High Court to quash the award on several grounds, one of which was that the termination of the workers was retrenchment and no compensation was payable as none of them had completed three years' minimum service. Salleh Abas F.J., sitting in the High Court at Kuala Lumpur held *'inter alia'* that the termination of the service of the workers was proper and there was no legal basis for the award of compensation to the workers. He therefore held that there was an error on the face of the record and that the award should be quashed. Mr. Nathan in this case submitted that the Industrial Court, as a creature of statute, must look for its powers and jurisdiction from within the four corners of the Act in question and that it has no power or jurisdiction to create any legal rights or duties between the parties to the dispute. He referred specifically to the following passage in the judgment of Salleh Abas F.J. in the said *Hotel Jaya Puri Berhad's*[2] case: —

"Even assuming that the court was right in holding that the termination of service is discharge, what is the legal basis for the compensation so awarded? There is nothing in the legislation nor in the Collective Agreements. I do not consider that sections 28, 29 and 30 of the Industrial Relations Act are wide enough to authorise the court to create legal rights and duties between the parties to the dispute or the party added subsequently. Hence I agree with counsel for the Hotel that compensation awarded is illegal. It seems that the workers raised the dispute because they thought that they ought to be compensated for loss of employment, but this 'ought' is not a matter which is provided for by the law or by the Collective Agreement, and I do not think that the Industrial Court can supply the gap short of legislation."

In reply to the above contentions, Mr. Xavier, counsel for the workman, submitted that section 20 of the Industrial Relations Act, 1967, did not confer on the Industrial Court what counsel for the company had described as a special jurisdiction to order reinstatement only. He contended that there was no authority for such a proposition and that counsel for the company was trying to read into that section of the Act the word "only" after the word "reinstatement". He referred to the following passage in the judgment of Lord Mersey in the case of *Thompson* v. *Goold & Co.*[3]: —

"It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. Here I see no necessity at all for introducing the words,"

and pointed out that it was the wrong thing to do as the jurisdiction of the Industrial Court in this case depended upon the construction of the relevant section read together with the whole of the Act as well as the objects of the Act as set out in the preamble thereof. Counsel also stated that in the case of a reference to the Industrial Court concerning the dismissal of a union member under section 26 of the Industrial Relations Act, the Industrial Court could either reinstate him or grant him compensation. He contended that it would lead to inconsistency, repugnancy and absurdity to the rest of the Act if the court were to adopt the construction of section 20 of the Act as suggested by counsel for the company and urged the court to adopt what Lord Diplock has called the "purposive approach" in the following passage of his judgment in the case of *Reg.* v. *National Insurance Commissioner, ex parte Hudson*[4]: —

"To find out the meaning of particular provisions in social legislation of this character calls, in the first instance, for a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them. Meticulous linguistic analysis of words and phrases used in different contexts in particular sections of the Act should be subordinate to this purposive approach. It should not distract your Lordships from it."

Counsel, therefore, submitted that section 20 of the Industrial Relations Act should be read together with section 30(6) of the Act in which section 20(3) of the Act was referred to. He contended that section 30(6) of the Act specifically empowers the Industrial Court to "include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under section 20(3)". He contended further that by virtue of section 30(6) of the Act the Industrial Court need not grant "the specific relief claimed" and that it had in this case deemed it expedient in the circumstances to award compensation in lieu of reinstatement. Lastly, on this point counsel for the workman also referred to the House of Lord's decision in the case of *Attorney-General* v. *Great Eastern Railway*[5] on the *'ultra vires'* doctrine in which case the Lord Chancellor (Lord Selborne) said: —

"But I agree with Lord Justice James that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires.*"

Counsel therefore contended that as there was no prohibition in the Act, express or otherwise, against the Industrial Court ordering compensation in lieu of reinstatement, there was therefore no excess of jurisdiction when it ordered payment of compensation.

Having considered the submissions of both counsel on this point, I considered that although section 20(1) of the Act provides for a workman who is not a member of a trade union to make representations in writing to the Director-General of Industrial Relations to be reinstated in his former employment if he considered that he had been dismissed without just cause or excuse by his employer, but when the Minister refers his representations to the Industrial Court for an award under section 20(3) of that Act, the said court in making its award is empowered under section 30(6) of the Act to consider matters other than the specific relief or demand claimed by the parties in the course of a trade dispute or in the matter of a reference to it under section 20(3) of the Act. With the greatest respect, I found myself unable to agree with the opinion of Salleh Abas F.J. in the said *Hotel Jaya Puri Berhad's* case[2] that section 30 of the Industrial Relations Act was not wide enough to enable the Industrial Court to award compensation. I was inclined to take the view that under section 30(6) of the Act, the Industrial Court in making its award may include in it any matter or thing, such as for instance the payment of damages or compensation, which it thinks necessary or expedient for the purpose of enabling it to settle any trade dispute or reference to it under section 20(3) of the Act. I think that such a view could be supported when one considers the provisions of subsection (4) of section 20 of the Act which provides that "where an award has been made under subsection (3), the award shall operate as a bar to any action for damages by the workman in any court in respect of wrongful dismissal". It would appear that if an Industrial Court did not have the power to order for instance the payment of damages or compensation under section 30(6) of the Act, instead of making an order of reinstatement under section 20 of the Act, then there would have been no necessity nor would it have been the intention of the legislature to provide expressly in the said subsection (4) of section 20 of the Act that where an award in which presumably the payment of damages has been included has been made under subsection (3), that award should operate as a statutory bar to any action for damages by the workman in any court in respect of wrongful dismissal. I therefore did not consider that the Industrial Court by awarding compensation in this case to the workman concerned had for that reason only acted in excess of or without jurisdiction.

However, it must also to be considered in this case wnetner the Industrial Court had misdirected itself, as alleged, on the question of redundancy and in failing to distinguish between "dismissal from service by reason of misconduct as a punitive measure" and "termination of service by due notice or salary in lieu" and that there was therefore an error of law which affected its jurisdiction. An error or errors of law on the face of the record which did not affect jurisdiction would not give the High Court jurisdiction to quash the Industrial Court's decision by *certiorari* proceedings. (See the recent judgment of the Privy Council in *South-East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*[6]). In this case, in so far as redundancy was concerned, the Industrial Court had made a finding of fact that there was no redundancy and as it has not been shown to me that that finding was wholly unsupported by the evidence, it could not therefore be questioned or interfered with by this court in the exercise of its supervisory jurisdiction.

As regards the failure of the Industrial Court to distinguish between "termination of service" and "dismissal", Mr. Nathan referred to the following paragraphs of subsection (3) of section 13 of the Industrial Relations Act on certain matters which no trade union of workmen may include in its proposals for a collective agreement: —

"(d) the termination by an employer of the services of a workman by reason of redundancy or by reason of the reorganisation of an employer's profession, business, trade or work or the criteria for such termination;

(e) the dismissal and reinstatement of a workman by an employer,"

and pointed out that even the Industrial Relations Act itself had recognised the distinction between "termination of service" and "dismissal and reinstatement" as two separate and distinct legal concepts. He also referred to sections 5(1)(d) and 5(2)(a) of the Act concerning the prohibition on employers and their trade unions in respect of certain acts which are as follows:—

"5(1)(d) dismiss or threaten to dismiss a workman, injure or threaten to injure him in his employment or alter or threaten to alter his position to his prejudice by reason that the workman —

(i) is or proposes to become, or seeks to persuade any other person to become, a member or officer of a trade union; or

(ii) participates in the promotion, formation or activities of a trade union; or

5.(2) Subsection (1) shall not be deemed to preclude as employer from —

(a) refusing to employ a person for proper cause, or not promoting a workman for proper cause, or suspending, transferring, laying-off or discharging a workman for proper cause;"

and submitted that it was therefore the intention of our legislature in the Industrial Relations Act, 1967, (Revised — 1976) to distinguish between termination of services by reason of redundancy or by reason of reorganization and dismissal from service as a punitive measure. On this point counsel for the company also argued that in construing the meaning of the words "dismissed without just cause or excuse" the provisions of section 20 of the Industrial Relations Act must not be read in isolation but must be seen in the light of the above-mentioned sections 5 and 13 of the said Act. Counsel also referred to the following provisions of sections 12 and 13 of the Employment Ordinance 38/1955: —

"12. (1) Either party to a contract of service may at any time give to the other party notice of his intention to terminate such contract of service.

(2) The length of such notice shall be the same for both employer and labourer and shall be determined by any provision made for such notice in the terms of the contract of service, or, in the absence of such provision, shall be in accordance with the provisions of subsection (3).

(3) The notice to terminate the services of a person who is employed under a contract of service shall be not less than —

(a) one week's notice if he has been so employed for less than two years;

(b) two weeks' notice if he has been so employed for two years or more but less than five years, and

(c) four weeks' notice if he has been so employed for five years or more:

Provided that the provisions of this section shall not be taken to prevent either party from waiving his right to notice on any occasion.

13. (1) Either party to a contract of service may terminate such contract of service without notice or, if notice has already been given in accordance with section 12, without waiting for the expiry of that notice, by paying to the other party a sum equal to the amount of wages which would have accrued to the labourer during the term of such notice.

(2) Either party to a contract of service may terminate such contract of service without notice in the event of any wilful breach by the other party of a condition of the contract of service,"

and pointed out that that Ordinance too had given statutory recognition to the right of an employer to terminate the services of his employee by due notice or salary in lieu of notice. Counsel then referred to the following provisions of section 14(1) of that Ordinance —

"An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry —

(a) dismiss without notice the employee; or,"

and pointed out that in contrast to the above-mentioned sections 12 and 13 of the Employment Ordinance, 1955, section 14 of that Ordinance was concerned with the dismissal of an employee on the grounds of misconduct.

Mr. Nathan concluded his submissions on this point by referring the court to several cases, one of which was *P. Raman* v. *Chairman, Board of Governors, Sekolah Rendah Jenis Kebangsaan Gopeng & Anor.*[7] In that case, the appellant had his services as sweeper cum watchman at a school terminated by the Board of Governors of the school. He made representations to the Minister of Labour under the former section 16A of the Industrial Relations Act, 1967, but his representations were rejected. The appellant then applied to the High Court for a declaration that his dismissal was wrongful. The learned trial judge held that as the matter had been considered and rejected by the Minister under the said section 16A of the Industrial Relations Act, 1967, the court was precluded from dealing with the matter. The Federal Court on appeal to it also held that as the Minister had made a decision for the purpose of subsection (5) of the said section 16A of the Industrial Relations Act, 1967 which provided that the decision of the Minister "shall be final and conclusive and shall not be challenged in any court or in a court established under the Act", his decision became final and conclusive. Mr. Nathan referred to the judgment of Ong Hock Sim F.J. (as he then was) in that case in which his Lordship opined that the appellant, a sweeper cum watchman in a Tamil School, was more correctly classified as a "labourer" under the Employment Ordinance than as a "workman" under the Industrial Relations Act. Counsel referred specifically to the following passage of the said judgment in which his Lordship had observed as follows: —

"Allegations of misconduct or of just cause or excuse for dismissal, are not required to justify dispensation of services pursuant to terms of a contract of employment. The Employment Ordinance of 1955 is unequivocal in this respect (vide sections 13(1) and 14(1)). I doubt that the Minister has power to order reinstatement in such case, in the absence of specific words in the legislation that this right of an employer to dismiss an employee has been curtailed or restricted. From the first step in this action, it is apparent that it should be struck out under Order 25 rule 4 on the ground that the statement of claim disclose not only no reasonable cause of action but no cause of action as it is quite inconceivable how the appellant can on the facts contend he had been *wrongfully dismissed.*"

In spite of his Lordship's doubts about the power of the Minister to order reinstatement because he was somewhat doubtful that the said section 16A had any application in that case, it must be also observed that Azmi L.P. (as he then was) also expressed the following view in his judgment in that same case: —

"It is not disputed that under section 16A the Minister may not only make an order of reinstatement but that he may also refuse to do so. We must assume that in this case he has exercised his discretion properly and he has therefore in rejecting the workman's representations considered the facts of the case."

It would therefore appear that although there was power to order reinstatement, yet it was a view expressed in the Federal Court in that case that an employee's services may be terminated pursuant to the terms of his contract of employment and that it would not be a case of wrongful dismissal in the absence of allegations of misconduct or of just cause or excuse for dismissal.

The other case referred to by counsel was *Haji Ariffin* v. *Government of Pahang.*[8] In that case the appellant was a kathi in the service of the State of Pahang and his services had been terminated by three months' notice. The appellant claimed that he had been unlawfully dismissed and that he had not been given an opportunity to defend himself before his services were terminated. His claim was dismissed by Raja Azlan Shah J. (as he then was) and in his judgment his Lordship said as follows: —

"It may well be that in certain cases misconduct, inefficiency, or other disqualification is the motive which influences Government to take action under the terms of the contract, but as long as the termination is founded on the rights flowing from the contract then prima facie the termination is not a punishment within the meaning of art. 135(2). The motive which sets the Government machinery in motion is irrelevant (see *Shrinivas Ganesh* v. *Union of India*).[9]

On appeal it was argued that only the Ruler could terminate the services of the appellant as he had been appointed by the Ruler and that his dismissal was not in accordance with law or the rules of natural justice as he had not been given an opportunity to be heard in charges brought against him. The Federal Court dismissed his appeal and held '*inter alia*' that the appellant's services in that case had been lawfully terminated by the Pahang State Government and that such termination did not involve a penalty or punishment so as to make it a dismissal within the meaning of Article 135(2) of the Constitution of Malaysia and to make it necessary first to give him a reasonable opportunity of being heard. In the course of his judgment, Suffian F.J. (as he then was) discussed with reference to the Pensions Ordinance the difference between an officer whose services has been terminated and that of an officer who has been dismissed and concluded as follows: —

"It is therefore clear that dismissal in West Malaysia is accompanied by penal consequences, but not mere termination of service. This was so found with regard to India by the Indian Supreme Court in *P.L. Dhingra* v. *Union of India*.[10]

Finally, counsel referred to the case of *Gnanasundram* v. *Public Services Commission*[11] in which the appellant had applied for an order of *certiorari* to quash the decision of the Public Services Commission terminating his appointment as a temporary officer and Raja Azlan Shah J. (as he then was) held *'inter alia'* that the applicant in that case was not dismissed from the service and therefore the provisions of Article 135(2) of the Constitution did not apply so as to give him an opportunity to be heard. In his judgment, his Lordship said as follows: —

"Dismissal pre-supposes some disciplinary proceeding against him whereby he is found guilty of indiscipline and misconduct under the Public Officers (Conduct and Discipline) Regulations, 1956. That is not the present position here. This is purely a case of a contract being terminated under one of its clauses. To say that the applicant was dismissed would be to use that word in quite a different sense from any in which, as far as I can see, it has hitherto been used."

Mr. Nathan, therefore, submitted that the legislature had, by the use of the words "without just cause or excuse" in section 20 of the Industrial Relations Act, 1967, intended to refer to the punitive aspect involved in a matter of wrongful dismissal.

Finally, counsel referred to the following passage on dismissal at page 696 of Vol. 2 (2nd edition) of *Malhotra* on "The Law of Industrial Disputes" in which the learned author of that book had stated as follows: —

"Dismissal — The dictionary meaning of the word 'dismissal' is 'to let go; to relieve from duty.' In the ordinary parlance it means nothing more or less than termination of a person's office. Dismissal is the ultimate and most drastic disciplinary sanction which may be inflicted by an employer for an act of misconduct against an industrial workman. A fortiori, if there is no misconduct, there can be no punishment. Termination of service, therefore, which is not by way of punishment would not tantamount to dismissal (sic). In the words of Gajendragadkar, J.: 'Punishment is, therefore, correlated to misconduct, both in its positive and negative aspects. That is to say, punishment could be sustained if there was misconduct and could not be meted out if there was no misconduct."

As regards the contention that there has been an error of law which had effected the Industrial Court's jurisdiction, Mr. Xavier, after referring to the following provisions of subsection (3)(a) of section 32 of the Industrial Relations Act, 1967, on the effect of an award by an Industrial Court: —

"(a) Subject to this Act, an award of the court shall be final and conclusive, and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court."

submitted on the limitations of the supervisory jurisdiction of the High Court in *certiorari* proceedings against Industrial Court awards. It would not be necessary and disrespectful, I think, not to refer to all the authorities quoted by him, except to *Reg.* v. *Industrial Injuries Commissioner, Ex parte Amalgamated Engineering Union*[12] in which case it was held *'inter alia'* by the English Court of Appeal that the courts would not interfere with the decisions of specialized statutory authorities under the U.K. Industrial Injuries Act "unless there was a real error of law."

As regards the complaint of the company that the Industrial Court had failed to distinguish between "dismissal" and "termination of services", Mr. Xavier submitted that dismissal under section 20 of the Industrial Relations Act, 1967 has no special or technical meaning and would also include termination of services under a contract of employment. He said that the concept of dismissal in the Industrial Relations Act was "unfair dismissal" i.e. dismissal without just cause or excuse which was different from "wrongful dismissal" which he said was a concept of the common law. Here I would pause to state that I had difficulty in understanding counsel's line of reasoning because I observed that the legislature had also used the expression "wrongful dismissal" in section 20(4) of the Industrial Relations Act, 1967 (Revised — 1976). I therefore did not think that there was any substance in that submission.

Be that as it may, Mr. Xavier's next point was that an Industrial Court could go behind a "termination order" to find out whether it was a colourable exercise of power as a cloak for dismissal. He quoted the Indian case of *Chartered Bank, Bombay* v. *The Chartered Bank Employees' Union*[13] in which a bank had terminated the services of its workmen in a case not involving disciplinary action for misconduct by three months' notice or on payment of three months' pay and allowance in lieu of notice without assigning any reason. It was held that "if the termination of service was a colourable exercise of power or as a result of victimization or unfair labour practice the (Indian) Industrial Tribunal would have the jurisdiction to intervene and set aside such termination, and to go behind the termination order to see whether it was a mere camouflage for a dismissal for misconduct without following the prescribed procedure." It was also held that "where the termination of service was capricious, arbitrary or unnecessarily harsh on the part of the employer judged by normal standards of a reasonable man, that may be cogent evidence of victimization or unfair labour practice." Counsel then pointed out that the Industrial Court in this case had found as fact that the exercise to retrench the workman in question was not *bona fide* and that was a finding which the High Court could not in its supervisory jurisdiction interfere or correct as there were no jurisdictional error or errors on the face of the record.

Mr. Xavier in his written submission has also pointed out that the term "dismissal" is defined in the U.K. Employment Protection (Consolidation) Act, 1978, (incorporating the U.K. Industrial Relations Act, Contract of Employment Act and the Redundancy Payment Act). Dismissal for the purpose of the U.K. Trade Union and Labour Relations Act, 1974, is not synonymous with being sacked and has the meaning assigned to it in that Act. I was not shown the relevant provisions of those United Kingdom statutes referred to by counsel nor did I think that it was necessary for me to examine them. As far as our own Industrial Relations Act, 1967 (Revised 1976) is concerned, the expressions "dismiss", "dismissal" and "termination of services" are not defined therein. The court could, of course, follow the well-

known rule that words should be taken to be used in their ordinary sense and refer to one of the authoritative dictionaries. In this case, however, I agreed with counsel for the company that as our legislature has chosen to use both the expressions "termination of services" and "dismissal and reinstatement" in the same Act, it was therefore the intention of our legislature that those expressions should have different meanings in it. It is true as pointed out by Mr. Xavier that those terms denote the cessation of employment, but they are cessation of employment in different circumstances. In the absence of statutorily-assigned meaning for the words "dismiss" or "dismissal" in our present Industrial Relations Act, 1967 (Revised — 1976), I would, with respect, agree with Raja Azlan Shah J. (as he then was) when he stated in the above-quoted *Gnanasundram's* case[11] that to say that a person whose contract was simply terminated under it was dismissed would be to use that word "dismiss" in quite a different sense from any in which it had hitherto been used. Although that case was concerned with the termination of employment of a public officer I would with respect agree with his Lordship that dismissal pre-supposes some disciplinary proceeding whereby an employee was found guilty of indiscipline and misconduct. Suffian F.J. (as he then was) also held the same view when he said in the above-quoted *Haji Ariffin's* case[8] that dismissal was accompanied by penal consequences but not mere termination of service. I was therefore of the view that dismissal for the purposes of section 20 of our present Industrial Relations Act, 1967 (Revised — 1976) cannot be equated to termination of services. In the present case it would appear from paragraph 20 of the Industrial Court's award that there was a finding of fact that there was a termination of the workman's services but there was no evidence or finding that he was punished for indiscipline or misconduct after some sort of inquiry. There was also no evidence or finding by the Industrial Court that the termination of the workman's services was, to use the words of the Indian Supreme Court in the said *Chartered Bank, Bombay's* case,[13] "capricious, arbitrary and a mere camouflage for a dismissal for misconduct without following the prescribed procedure". In my view, the Industrial Court therefore erred in law when it misinterpreted the word "dismissed" in section 20 of the Industrial Relations Act, 1967 (Revised — 1976) and concluded in the said paragraph 20 of its award that the termination of the workman's services was a "dismissal without just cause". It was my judgment that the said court did not have the power or jurisdiction under the present provisions of the said section 20 of the Industrial Relations Act, 1967 (Revised — 1976) to arrive at such a finding, or, to use the words of Lord Reid in the House of Lord's case of *Anisminic Ltd.* v. *Foreign Compensation Commission*,[14] "it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." Because I considered that the Industrial Court had no jurisdiction or power to conclude that the termination of services of the workman in this case was a dismissal under section 20 of the Industrial Relations Act, 1967 (Revised — 1976), it was my judgment that there was an error of law on the face of the record that gave rise to an excess of jurisdiction and I therefore ordered that the said Industrial Court Award No. 66/79 be removed into the High Court to be quashed. As the company had succeeded on one of its grounds, I therefore also ordered the workman to pay half the costs of the said originating motion.

From the above judgment the respondent appealed to the Federal Court.

FEDERAL COURT.

D.P. Xavier for the appellant.

V.T. Nathan for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): We set aside the order of *certiorari* made by the High Court in Penang on an application by the applicant employers to quash the award given by the Industrial Court to the workman. We now give our reasons.

Mr. Goon, the workman, had his employment with the respondent company terminated on the stated ground of redundancy, as clearly appeared in the letter of termination of service served on him. He was given one month's notice and an ex-gratia payment of six months' pay by way of retrenchment benefit in recognition of his past services. The month's notice was in compliance with a term of his employment. Mr. Goon did not however concede that there was any redundancy in the company and he made representations on dismissal without just cause or excuse to the Director-General. On being referred to these representations by the Minister, the Industrial Court held an inquiry and on the evidence led before it, found as facts that there was no redundancy that would justify the company dismissing or terminating the employment of the workman on this score, and that the real reason for the action taken against the workman was the difference with Mr. Loke, the Financial Manager, and it therefore came to the conclusion that the dismissal was without just cause or excuse. In the circumstances of the case, the Industrial Court did not think it would order reinstatement of the workman in his employment, but made an award of compensation in lieu of the reinstatement asked for.

In the statement annexed to its application for *certiorari*, the company attacked each and every finding of the Industrial Court as an error of jurisdiction or, the case being started before the Privy Council delivered its judgment in the *South-East Asia Fire Bricks'* case,[6] an error of law on the face of the record.

The High Court agreed entirely with the Industrial Court that there was no redundancy, but agreed with the company that the employment of the workman had been terminated in accordance with the contract of employment and it held that in law an employer could do so without making itself liable under the Industrial Relations Act, 1967 to an order of reinstatement or compensation in lieu of reinstatement. The workman then appealed to this court.

It appears to have escaped the notice of the company's counsel both in the High Court and before us that in its statement in reply to the statement of the workman's case in the Industrial Court, the com-

pany had nowhere raised the issue of lawful termination in accordance with the contract. But the High Court was completely taken up with this one argument and it held a person whose contract was simply terminated was not dismissed in the sense that word was used in section 20 of the Industrial Relations Act, 1967 (the Act), under which the workman had made his representations; there was therefore no evidence that the workman had been dismissed and that in coming to this finding of fact, the Industrial Court had committed a jurisdictional error.

After we had allowed the appeal from the decision of the High Court but before we had time to give our reasons, another division of this court delivered a considered judgment which dealt, *inter alia*, with this very same point. In *Dr. A. Dutt* v. *Assunta Hospital*,[15] this court held that the so-called "termination simpliciter" i.e. a termination by contractual notice and for no reason, if ungrounded on any just cause or excuse would still be a dismissal without just cause or excuse and on the workman's representations, the Industrial Court may award reinstatement or compensation in lieu of reinstatement.

Under the Industrial Relations Act, 1967 what the employee can do in the case of a unilateral termination is to apply under section 20(1) of the Act. This section which reads:

"20. (1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within thirty days of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed."

is, in our view deliberately, couched in subjective terms. Where a non-union workman considers that his dismissal is without just cause or excuse, he may make representations for his reinstatement. It is not whether he had been dismissed without just cause or excuse; but it is how he considers he has been treated by his employer that constitutes the test for his action.

We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

In the instant case, the High Court entirely agreed with the Industrial Court that there was no redundancy. Indeed, it could not do otherwise on the evidence. But even assuming for the moment that the High Court would be correct in disagreeing with the Industrial Court on what is essentially a finding of fact and disregarding the ouster provisions in the Act, we would adopt the words of May J. in *London Transport Executive* v. *Clarke*[16]:

"... though we may disagree with it as a matter of fact, (we do not think) it can be upset on appeal by this appeal tribunal. We think it of prime importance in these cases that, unless it can be demonstrated that the industrial tribunal has gone wrong in law, this appeal tribunal should uphold the decisions of industrial tribunals who after all are there, as the Court of Appeal has said, to decide these very things; and the whole purpose, efficacy and informality of industrial tribunals, just as with so many other domestic tribunals that exist in modern society, would be undermined completely, if after a minute examination, as it was described in one case, the appeal tribunal was prepared to disturb decisions of industrial tribunals which otherwise did not err in law."

But on the finding that there was no redundancy as suggested by the company the conclusion is inevitable that the termination was without the cause or excuse advanced and therefore without just cause or excuse.

We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for *certiorari*, we are of the opinion for the reasons given by this court in *Dr. Dutt's* case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation in lieu of reinstatement.

For these reasons, the appeal was allowed with costs here and in the High Court.

Appeal allowed.

Solicitors: *D.P. Xavier & Co.; Shearn, Delamore & Co.*

G TEONG WEE MEOW v. GOH POH CHAN & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) June 25, 1980 & April 7, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 53 of 1979]

Tort — Negligence — Failure to provide safe place of work or safe system of work — Digging well near pig-sty — Deceased persons overcome by gaseous fumes and vapours from well — Liability of employer.

Labour Law — Deceased persons employed to dig well near pig-sty — Overcome by gaseous fumes and vapours from well — Failure to provide safe place of work or safe system of work.

In this case the appellant employed the deceased persons and other persons to dig a well for the pigs on the appellant's land near his pig-sty. While working in the well the deceased persons were overcome by gaseous fumes and vapours from the well resulting in their deaths. It was alleged that the appellant was negligent in failing to provide a safe place of work or safe system of work. Earlier a worker working in the well had fainted and the appellant knew this. It was therefore claimed that the appellant knew that the place was unsafe and he failed to warn the deceased persons of the dangerous condition of the well which he knew or ought to have known. The learned trial judge found for the respondents and the appellant appealed.